RECENT DECISIONS.

CARRIERS—DUTY OF CONDUCTOR TO DEMAND TICKETS. Plaintiff while riding on defendant's car, in response to the conductor's request for fare offered a detached coupon, which was not good when detached. He refused to show his coupon book and was ejected. *Held*, it was not required of the conductor to demand another fare after the plaintiff offered the worthless coupon. *United Rys. & Electric Co.* v. *Hardesty* (Md. 1902) 51 Atl. 406.

Even if a second demand had been considered necessary the refusal to accept the ticket and threats to eject the plaintiff would seem to amount to a demand. The question here decided appears never to have been discussed in a case before, but seems to have been taken for granted in several cases. *N. & W. R. Co.* v. *Wysor* (1886) 82 Va. 250; *Ferguson* v. *Mich. Cen. R. Co.* (1894) 98 Mich. 533; *Texas Pacific Ry. Co.* v. *James* (1891) 82 Texas 306.

CARRIERS—DUTY TO PROVIDE SAFE DEPOT FACILITIES. The defendant used a depot owned and managed by a union depot company. The plaintiff, who was not a passenger, but who had come to buy a ticket for later use, fell on an icy sidewalk on the premises and was injured. *Held*, that the defendant was bound to furnish proper depot facilities, and was liable although the injury was caused by the negligence of the depot company. *Herrman* v. *Great Northern Ry. Co.* (Wash. 1902) 68 Pac. 82.

It is well settled that a railroad company must provide a suitable station, and must make the premises reasonably safe. Hutch. on Carriers, § 516 *et seq.* It owes this duty not only to passengers, but to all who have business there according to the implied invitation of the company. *M. & E. Ry. Co.* v. *Thompson* (1884) 77 Ala. 448. This being true it follows that such duties cannot be evaded by delegating their performance to other parties. The point has been expressly decided where the plaintiff was a passenger. *Seymour* v. *C. B. & Q. R. R. Co.* (1871) 3 Biss. 43; *Glenk* v. *Gulf, C. & S. F. R. R. Co.* (1895) 9 Tex. Civ. App. 599; but it would seem to make no difference whether he were a passenger or a person on the premises by invitation. *M. & E. Ry. Co.* v. *Thompson, supra.*

CARRIERS—LIABILITY FOR LOSS OF MAIL. Where a registered letter in course of transit in the mail was lost through the negligence of the railroad company's servant, it was *held* that the railroad company owes no duty whatever to the addressee of the United States mail carried by it. *German Bank* v. *Ry. Co.* (C. C. D. of Minn. 1901) 113 Fed. 414. See NOTES, p. 410.

CARRIERS—LIABILITY BEYOND TERMINUS OF LINE. A. shipped goods, receiving a receipt which stated that the shipment was accepted subject to the conditions in the company's regular bill of lading, but no copy of the bill of lading was given him. The goods were damaged beyond the terminus of the road. *Held*, that the stipulations in the bill were binding though the shipper had no actual notice of the terms, he having been put upon inquiry. *Dunbar* v. *Charleston & W. C. Ry. Co.* (S. C. 1902) 40 S. E. 884.

Liability of a carrier for loss beyond its own line depends solely upon contract, and the shipper must show an undertaking by the carrier to become liable. *Piedmont Mfg. Co.* v. *Columbia & Greenville R. Co.* (1882) 19 S. C. 353. The question therefore is really what evidence can

be adduced from which a contract liability is to be presumed. In the principal case the receipt given to the shipper provided for a through shipment to New York, and in the absence of the bill of lading would accordingly have been sufficient evidence of a contract liability all the way to New York. *Muschamp* v. *Railway* (1841) 8 M. & W. 421; *Kyle* v. *Laurens R. Co.* (S. C. 1857) 10 Rich. 382. But this evidence was negatived by the mention of the bill of lading in the receipt, taken in connection with the bill of lading itself. It would therefore appear that the result reached by the Court was correct though the case was treated illogically from the standpoint of limitation of common law liability. *Louisville & Nashville R. Co.* v. *Meyer* (1886) 78 Ala. 597.

CONSTITUTIONAL LAW—FEDERAL AND STATE COURTS—RECEIVERS—INJUNCTION—CONTEMPT—RAILROADS—HIGHWAYS. A Federal Court ordered its receiver to tear up and sell a bankrupt railroad in Wisconsin. Relying on an injunction from a Wisconsin court, restraining said receiver on the ground that the railroad was a highway which could not be destroyed without the consent of the State (St. Wis. 1898, § 3241), A, B and C interfered with the receiver. *Held*, such interference was in contempt of the Federal court. *Royal Trust Co.* v. *Washburn, B. & I. R. Ry. Co.*, (1902) 113 Fed. Rep. 531.

Since the Federal court has taken jurisdiction, its order of sale could be properly reversed only by an appellate court of the United States. To permit the State court to enjoin the Federal receiver would be to give it power to review the decision of the Federal court. The cases of *Ableman* v. *Booth* (1858) 21 How. 506, 523 to 525, and *In re Holman* (1869) 28 Iowa, 88, though not strictly analogous, show the impossibility of this. But see dissenting opinion of CHASE, C. J., in *Tarble's Case* (1871) 13 Wall. 397, 412. Sec. 3, Act of Aug. 13, 1888 (25 Stat. 436), permitting actions against Federal receivers without permission of the appointing court, was enacted for convenience in original suits against Federal receivers of long lines of interstate railroad, not in order to permit State courts to reverse orders already made by United States courts. The report of the case is unsatisfactory and does not show how the Federal court obtained jurisdiction; and why, in disposing of a road incorporated by and wholly within Wisconsin, it was not bound by the laws of that State (St. Wis. 1898, § 3241). Cooley, Const. Lims., 17 *et seq.*

CONSTITUTIONAL LAW—INHERITANCE TAX—DISCRIMINATION—FOURTEENTH AMENDMENT. A Statute of Wisconsin (Laws 1899, c. 355) taxed inheritances, gifts, or sales of personal property in contemplation of death, from estates of over ten thousand dollars in value. *Held*, that the law was unconstitutional and void: because A, who, from an eleven thousand dollar estate, inherits two thousand dollars, is taxed; while B, who, from a nine thousand dollar estate, inherits the same amount and is, therefore, in the same class, is not taxed. This is discrimination, and in violation of the State and Federal Constitutions, (14th Amendment), for it confers special privileges and denies the equal protection of the laws. *Black* v. *State*, (Wis. 1902) 89 N. W. 522.

The provision of the Statute in question is borrowed from New York, where, however, the point has never been raised. The decision seems unsound. "1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or by descent is the creature of the law, and not a natural right,—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles, it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation." *Magoun* v. *Ill. Trust. & Sav. Bk.* (1897) 170 U. S. 283, 288, and cases there cited. But see dissent by BREWER, J., at p. 301. The Wisconsin decision is in accord with *State* v. *Ferris* (1895) 53 Oh. St. 314.

CONSTITUTIONAL LAW—STATE REGULATION OF INTERSTATE COMMERCE—LONG AND SHORT HAUL. The constitution of Kentucky (§ 218) forbids in general any railroad's charging more for a long haul than for a short haul. *Held*, that in so far as this prohibits a greater charge for a haul entirely within the State as compared with a longer haul, partly within and partly without the State, it is unconstitutional and void; because it amounts to a regulation, by the State, of interstate commerce. (BREWER and GRAY, JJ., dissenting.) *L. & N. R. R. Co.* v. *Eubank* (1902) 184 U. S. 27. See NOTES, p. 402.

CONSTITUTIONAL LAW—THE ELEVENTH AMENDMENT—SUITS AGAINST STATE OFFICERS. The Union Pacific R. R. Co. brought a bill in equity in the circuit court for the district of Colorado against the officers of the state board of equalization to compel them to assess certain property. The defendants claimed to act under a statute which by the bill was alleged to be unconstitutional. *Held*, though the State courts had not passed upon the validity of the statute the Eleventh Amendment did not prevent such an action in a Federal court. *Union Pac. R. R. Co.* v. *Alexander et al.* (1901) 113 Fed. 347.

As a general rule if a private suitor, while not impleading a State by name, seeks a decree involving the dignity or interest of the State, the court will dismiss the complaint in obedience to the Eleventh Amendment. *Cunningham* v. *Macon & Brunswick R. Co.* (1883) 109 U. S. 446; 2 COLUMBIA LAW REVIEW, at p. 284. The principal case, however, is not within this rule. A State officer is liable to suit for an act not authorized. *Gregg* v. *Sanford* (1895) 65 Fed. 151. He is equally liable when doing a wrongful act under color of an unconstitutional law. *Osborn* v. *Bank of United States* (1824) 9 Wheat. 738. In such cases the officer is not the State and the latter is not interested. Having jurisdiction over the parties by the allegations of diverse citizenship it was the duty of the court to decide upon the constitutionality of the act in question. *Cohens* v. *Virginia* (1821) 6 Wheat. at p. 404.

CONTRACTS—ANTICIPATORY BREACH—INSTALMENT CONTRACT. The plaintiff contracted to sell the defendant iron, payment to be made upon the delivery of each hundred tons. The defendant after receiving one hundred tons refused to pay until the plaintiff sent more iron, so that the defendant would know that the plaintiff intended to complete the contract. *Held*, that the refusal of the defendant amounted to an anticipatory breach and the plaintiff was justified in abandoning the contract and suing for the reasonable value of the contract. *Johnson Forge Co.* v. *Leonard* (Del. 1902) 51 Atl. 305.

The question whether the acts of the defendant amount to an anticipatory breach is a question of fact. *Freeth* v. *Burr* (1874) L. R. 9 C. P. 208; *Mersey Iron Co.* v. *Naylor Co.* (1884) L. R. 9 A. C. 434. If there is an anticipatory breach the plaintiff may at once abandon the contract. *Hochester* v. *Delatour* (1853) 2 El. & Bl. 678; *Roehm* v. *Horst* (1900) 178 U. S. 1. There is some tendency to confuse the question of anticipatory breach with the question of failure to perform as a condition precedent to further performance. The two questions are distinct and one is a question of fact and the other one of law. The principal decision follows *Withers* v. *Reynolds* (1831) 2 B. & A. 882.

CONTRACTS—ANTICIPATORY BREACH OF AGREEMENT TO HOLD STOCK—MEASURE OF DAMAGES. Brokers contracted with their client to carry over stock purchased for him until the next settlement. Before that time they sold the stock lower than the carrying-over prices. At the next settlement the prices were higher. *Held*, in an action against the brokers brought after the settlement, that the unauthorized sale was an anticipatory breach only and that, as the client had elected to treat the contract as subsisting, he could recover the difference between the carrying-over prices and those at the date fixed for performance. *Michael* v. *Hart & Co.* [1902] 1 K. B. 265, 48.

The defendant contended that the sale should be treated as a final breach and damages determined by the difference between the carrying-over price and the selling price. The decision accords with the well-established rule in jurisdictions recognizing the doctrine of anticipatory breach that the party not in default has an option either to sue at once or to treat the contract as subsisting and wait for the time of performance before suing. *Johnstone* v. *Milling* (1886) L. R. 16 Q. B. D. 460; *Howard* v. *Daly* (1875) 61 N Y. 362.

CONTRACTS—INSTALMENT—FAILURE TO PAY. The defendant contracted to deliver coal to the plaintiff in monthly instalments, from January to December, payment to be made on the twentieth of the month for the deliveries of the month before. The plaintiff failed to pay for the November instalment and the defendant refused to make further deliveries. *Held*, that the failure of the plaintiff to make the payment justified the defendant in refusing to make further deliveries. *Hull Coal & Coke Co.* v. *Empire Coal & Coke Co.* (C. C. A. 4th Circ. 1902) 113 Fed. 256.

The principal case follows the more popular American view. *G. H. Hess Co.* v. *Dawson* (1894) 149 Ill. 138. See 1 COLUMBIA LAW REVIEW, 317. Any distinction between the effect of failure to pay and failure to deliver seems artificial, as prompt payment is of as much importance in mercantile transactions as prompt delivery. In most of the United States a failure to deliver any instalment is held to be a condition precedent to the performance of the other party, *Cresswell Ranch Co.* v. *Martindale* (1894) 63 Fed. 84; and no distinction is made between a breach of the first delivery and any subsequent delivery. The English view is that a failure to perform any single instalment is not a condition precedent to further performance, unless the breach goes to the whole consideration. *Mersey Iron Co.* v. *Naylor* (1884) L. R. 9 A. C. 434. There is some authority in the United States for holding a failure to pay is not a condition precedent to subsequent performance. *Osgood* v. *Bander* (1888) 7 Iowa 550; *West* v. *Betchel* (1900) 125 Mich. 144; *Monarch Cycle Co.* v. *Royer Wheel Co.* (1900) 105 Fed. 324. The view of the principal case is more in accordance with business understanding and reason.

CONTRACTS—REVOCATION OF OFFER. The defendants promised to pay the plaintiff a sum of money on the completion of its road. The plaintiff did some work on the railway, but the defendants revoked their offer before it was completed. *Held*, though the offer contemplated a unilateral contract, when the plaintiff had paid money and done work on the strength of it, the contract became bilateral, and in order to rescind it, the defendants must pay to the plaintiffs the expenses incurred by them. *Los Angeles Traction Co.* v. *Wilshire* (Cal. 1902) 67 Pac. 1086.

An offer contemplating an act as acceptance, is revocable at any time before that has been performed. *Offord* v. *Davies* (1862) 12 C. B. N. S. 748; Langdell, Sum. Law of Contr., § 4. An offer must be accepted in its terms, and the offer could not be accepted here except by completion of the railway. The court does not cite any authorities in support of the remarkable doctrine that an offer, which, if accepted, would be a unilateral contract, becomes a bilateral contract by part performance of the act required, and the doctrine seems to be novel. It needs only to be stated, however, to refute itself.

CORPORATIONS—BENEFICIAL ASSOCIATION—EFFECT OF CHANGE IN BY-LAWS ON INSANE MEMBER. The defendant association altered its by-laws to the effect that, unless a new designation of beneficiaries was made, no benefit should accrue. The plaintiff, otherwise, would have received the benefits of her son's membership. The son made no new designation, as he was insane at the date of the change and continuously thereafter until death. *Held*, the alteration was not effective upon a member incapacitated by act of God from complying therewith. *Grossmayer* v. *Dist. No. 1 Indep. Order of B'nai B'rith* (1902) 70 App. Div. 90.

It is held that insanity does not excuse the payment of premiums. *Wheeler* v. *Ins. Co.* (1880) 82 N. Y. 543; but this decision is largely put

upon the ground that performance is there possible by others than the insured and the suggestion was made that the rule would be otherwise were the act in its nature performable only by the person under the disability. The principal case converts this dictum into law. Since the by-laws of the organization enter into the contract between it and the member, *Suly* v. *Mutual Ass'n* (1895) 145 N. Y. 563, and the only test of the validity of new by-laws is their reasonableness, *Parish* v. *Produce Exchange* (1901) 169 N. Y. 34, the amendment in the principal case created a condition precedent to the defendant's liability. Whether insanity should excuse performance in such case, when it does not excuse the non-payment of premiums, does not seem to have arisen heretofore.

CORPORATIONS—CALLS. Defendant was a stockholder of record when a call was made by the directors, but sold and transferred his shares before the call was due. *Held*, that his liability became a debt when the call was made, and therefore he and not the transferee was bound to pay. *Am. Alkali Co.* v. *Campbell* (C. C. E. D. of Pa. 1902) 113 Fed. 398.

The liability of stockholders on calls for unpaid subscriptions is based on the promise, express or implied, in the original subscription, to pay when the directors shall make a demand. Cook, Corporations, §§ 104, 105. The law seems to regard this liability as arising when the call is made, as in the principal case, although authority on the point is meagre. *In re China Steamship Co.* (1869) L. R. 7. Eq. 240. The same result was reached in New York in a similar case. *Schenectady etc. Co.* v. *Thatcher* (1854) 11 N. Y. 102.

CORPORATIONS—ELECTRIC LIGHT COMPANIES—POWER TO MORTGAGE FRANCHISES. An electric light and power company mortgaged its franchises and property, without express legislative authority to do so. It had general powers to buy and sell property and to make contracts for the purposes of its business. *Held*, that the mortgage was valid, and that the operating franchises passed under it. *Am. Loan & Trust Co.* v. *General Electric Co.* (N. H. 1901) 51 Atl. 660.

It is said to be a rule of law that quasi-public corporations cannot, without express legislative authority, sell or mortgage their franchises or property necessary for the discharge of their public duties. The reason is public policy. See Thompson, Corporations, § 5355, and cases cited. The court in the principal case recognized this rule, and said also that the electric light company was quasi public, but declined to apply the rule, because it did not regard the reasons of policy sufficient to cover the case. The general tendency is in this direction and railroad companies now seem to be the only corporations to which the doctrine is consistently applied. Cook, Corporations, § 780, and cases cited. *Thomas* v. *R. R. Co.* (1879) 101 U. S. 71. Gas companies may apparently mortgage their public property and franchises. *Hunt* v. *Memphis Gas Co.* (1895) 95 Tenn. 136. No express adjudication as to electric light companies has been found, but the analogy to the gas company decisions is not difficult to draw. The power in question is usually given by statute. See N. Y. Stock Corp. Law, § 2.

CORPORATIONS—NATIONAL BANKS — SHAREHOLDER'S LIABILITY — STATUTE OF LIMITATIONS. The plaintiff, as receiver of a national bank, filed a bill in equity to recover assessments upon shares fraudulently transferred by the defendant with intent to avoid this assessment. *Held*, the individual liability of a shareholder of a national bank for assessments, was not a "contract or promise in writing," and, whether a promise raised by statute or upon an implied contract, was barred by a statute requiring actions "upon contracts not in writing, expressed or implied," or "upon a liability created by statute," to be begun within four years. *McDonald* v. *Thompson* (1902) 184 U. S. 71.

The case is interesting as showing that a stockholder's liability to pay assessments is not based on a promise in writing. The liability to pay calls, however, is a promise, express or implied, included in the original subscription. Cook, Corporations, §§ 104, 105.

CRIMINAL LAW—UNLAWFUL ASSEMBLIES. The defendant had held public meetings, at which he had used insulting language calculated to inflame persons of a certain religious persuasion. Breaches of the peace had frequently occurred, though the defendant had always urged his own adherents not to use violence. On his preparing to hold more meetings of the same kind, it was *held* that he could be bound over to keep the peace. *Wise* v. *Dunning* [1902] 1 K. B. 167.

The case goes further than any case decided heretofore in holding a man criminally responsible for the natural consequences of his acts. The same principle, however, was recognized in *Beatty* v. *Gillbanks* (1882) 9 Q. B. D. 308, though in that case the court held that the defendant's act did not naturally result in a breach of the peace. Here, moreover, the defendant, though he had used no violence himself, was hardly innocent. The decision is common sense.

EQUITY—FRAUDULENT CONVEYANCE. Land belonging to a ward was sold by the guardian, a married woman, under an order of the court, and bought in by the guardian's husband. This sale was then confirmed by the court. The husband sold to a vendee who had notice of the facts. *Held*, that the ward could recover the land from the husband's vendee. *Frazier* v. *Jeakins* (Kan. 1902) 68 Pac. 24.

The case was not decided on the common law theory of the unity of husband and wife, for a statute gives married women the right to hold property independently of the husband. Kan. Gen. Stat., ¶ 3752. The doctrine that a sale to his wife, by a person in a fiduciary position, of the things intrusted to his care, falls within the reason of the rule that forbids a trustee or agent to sell to himself, has been applied in other states having similar statutes. *Leitch* v. *Wells* (1867) 48 Barb. 637; *Bassett* v. *Shoemaker* (1890) 46 N. J. Eq. 538. In *Davoue* v. *Fanning* (1816) 2 Johns. Ch. 251, a sale of the trust *res* by an executor to a third party in trust for the executor's wife was set aside for the reason adopted in the principal case, although the executor was authorized to sell the property, and the transaction was in good faith. In *Crawford* v. *Gray* (1891) 131 Ind. 53, a contrary result was reached on facts similar to those of the principal case, and the court held that, as by statute a married woman could hold land independently of her husband, there was no reason why she could not become a purchaser at a sale of the trust *res*. That the sale had been confirmed by the court was held in the principal case to make no difference, as it was said to be a well established rule in Kansas, whatever the law might be in other States, that a confirmed sale is *res judicata* as to irregularities only, and cures nothing of substance. See, however, *Corbin* v. *Baker* (1901) 167 N. Y. 128; 1 COLUMBIA LAW REVIEW, 562.

EQUITY—INJUNCTION—LACHES. The City of New York commenced building a dam for the purpose of diverting a river which rises in New York and flows into Connecticut. Riparian owners in the latter State objected. After two years' fruitless efforts to agree upon a settlement, suit was brought asking for an injunction. *Held*, the right to an injunction had been lost by the plaintiffs' laches. *Pine et al.* v. *City of New York* (1902) 22 Sup. Ct. Rep.

The court refused to pass upon the only question raised in the lower courts, namely, the power of a State even under the exercise of its right of eminent domain to divert an interstate stream. See 2 COLUMBIA LAW REVIEW, 47. The decision cannot be supported on the ground of laches alone. *Lonsdale Co.* v. *City of Woonsocket* (1899) 21 R. I. 498; *Missouri* v. *Illinois* (1901) 180 U. S. 208. The court, however, tried to work out an estoppel. "It would be inequitable," the court says, "to permit them to carry on negotiations with a view to compensation until the city had gone to such great expense, and then, failing to agree upon the compensation, fall back upon the alleged absolute right to prevent the work." Negotiations for the sale of a right do not usually have such an effect. *Young* v. *Chicago Ry.* (1871) 28 Wis. 171. The decision in the principal case was avowedly influenced by the fact that this was an

attempt to invoke the aid of a court of equity "against public convenience," and that the rights of the plaintiffs "can be measured in money, and that not a large sum."

EQUITY—INJUNCTION—MISTAKE OF LAW. The plaintiff by the advice of a lawyer, attempted to redeem a certain piece of his property by payment of the sum due, with interest. Though the correct amount was paid, the wrong procedure was used and this complaint was brought to restrain the sheriff from deeding the property to the purchaser at the sheriff's sale. *Held*, equity will relieve against a mistake of law which involves a doubtful principle or where it would be to the unconscionable advantage of the adverse party. *Mackay* v. *Smith et al.* (Wash. 1902) 67 Pac. 982.

The maxim *Ignoratia legis neminem excusat* is recognized in equity as well as in law, and permits of few exceptions. *Hunt* v. *Rousmanier* (1813), 8 Wheat. 174. No sound distinction can be made between mistakes, resulting from clear and certain law, and those, due to doubtful law, as in legal contemplation all principles of law are clear and certain. *Story's Equity Jurisprudence*, Sec. 126; *Cann* v. *Cann* (1716), 1 P. Wms. 722. This doctrine was questioned by Lord ELDON in *Stockby* v. *Stockby*, (1812) 1 V. & Beaves, 31, but it has been supported by the weight of authority. *United States* v. *Daniel* (1838) 12 Pet. 32; *Jacobs* v. *Morange* (1871) 47 N. Y. 57. Nor does equity grant relief against a mistake of law because the adverse party will gain an advantage unless relief is granted. *United States* v. *Daniel* (*supra*). The refusal of equity to take jurisdiction in such cases is grounded in public policy. *Lyon* v. *Richmond* (1816) 2 Johns. Ch. 51.

EQUITY—PROTECTION OF TRADE-MARKS—WORDS IN COMMON USE. Where the plaintiff, who manufactured letter-files, stamped with the name "Favorite," sought to have the defendant enjoined from using a label resembling his own, on a similar article, it was *held* (PARKER, C. J., dissenting) that "Favorite" was descriptive of quality and could not be used as a trade-mark. *Waterman* v. *Shipman* (1891) 130 N. Y. 301, distinguished. *Cooke & Cobb Co.* v. *Miller* (1902) 170 N. Y. 475. See NOTES, p. 406.

EQUITY—RES JUDICATA. The plaintiff issued its policy to the defendant, with a parol agreement that certain concurrent insurance be simultaneously procured. This the defendant failed to do, yet, a loss occurring, the plaintiff paid the defendant, with knowledge of the facts, the amount for which it would have been liable had the concurrent insurance been procured. The defendant sued at law for the balance of the policy, and got a judgment. On a bill in equity to be relieved against the judgment, it was *held*, (five judges dissenting) the plaintiff's liability was not *res judicata* by the judgment. *Commerc. Union Ass. Co.* v. *Rubber Co.* (N. J. 1902) 51 Atl. 451

While a judgment at law is not *res judicata* in equity if the equitable grounds relied on were not cognizable as a defense at law, *Pollock* v. *Gilbert* (1853) 16 Ga. 398; *Borcherling* v. *Ruckelhaus* (1892) 49 N. J. Eq. 340, on the other hand, equity will not give relief where the matter relied on was admissible as a legal defense, and plaintiff was not prevented from offering it by fraud, mistake, or surprise. *Ins. Co.* v. *Hodgson* (1813) 7 Cranch 332; *Isham* v. *Cooper* (1898) 56 N. J. Eq. 398. *R. R.* v. *Haws* (1874) 56 N. Y. 175, practically a decree in equity for a new trial at law, is limited by *Ingalls* v. *Bank* (1900) 51 App. Div. 305. Certainly if a plaintiff knowingly waives a breach of condition, equity will not protect against the resulting judgment. *Henry* v. *Elliott* (N. C. 1860) 6 Jones Eq. 175. Such a breach the defendant in the principal case was guilty of, but the plaintiff waived it by the payment. *Rubber Co.* v. *Ass. Co.* (1900) 64 N. J. L. 580. While this payment may have been necessary for the plaintiff to get equitable relief, yet the plaintiff did not need equity's protection, for he could have relied on the breach of condition by the defendant.

INSOLVENCY—CONVEYANCE IN FRAUD OF CREDITORS. A, who was contesting his father's will, agreed with B, his mother, the principal legatee, that he would give up the contest in return for a conveyance of part of the estate. When the agreement came to be reduced to writing it was provided that, A being insolvent, the transfer should be made to C, his daughter, and the property was so conveyed by B. *Held*, the conveyance was in fraud of A's creditors, who could maintain a bill to set it aside. *Smith* v. *Patton* (Ill. 1902) 62 N. E. 794.

The court seemed to regard this transaction as a voluntary assignment by A to C of his rights under the original agreement. As such it would be void as against creditors since the Illinois statute as to fraudulent conveyances expressly includes things in action. It seems simpler, however, to consider this the case of a purchase by a debtor in the name of a third party. Though the statutes against fraudulent conveyances have usually been held to apply only to conveyances by the debtor, and not to cases like this, *Gowing* v. *Rich* (1891) 1 Ired. Law, 553, *Edmondson* v. *Meacham* (1874) 50 Miss. 34, yet a trust will result to the debtor, of which his creditors can take advantage in equity. *Bean* v. *Smith* (1821) 2 Mason 285, *Dewey* v. *Long* (1853) 25 Vt. 564. And this is the rule even where resulting trusts have otherwise been abolished. *Leonard* v. *Green* (1883) 30 Minn. 496.

INSURANCE—FIRE POLICY—AMOUNT OF LOSS. Plaintiff's building, which was insured in the defendant company, was burned. After the issue of the policy a law had been passed requiring walls of buildings in certain parts of cities to be of certain thickness, on account of which law the plaintiff could not rebuild as before. *Held*, that the defendant must pay what it would cost to replace the building according to the new law. *Penn. Co.* v. *Phila. Contributorship, etc.* (Pa. 1902) 51 Atl. 351.

It is well settled that a fire insurance contract is one of indemnity only. The compensation generally allowed is the real value of the building at the time of loss, and the cost of rebuilding is said to be immaterial. May, Insurance, § 423 A; *Waynesboro Ins. Co.* v. *Creaton* (1881) 98 Pa. St. 451. The principal case is treated as one of novel impression. The theory of the decision is that the necessary extra cost of rebuilding is part of the actual loss, and the proximate result of the fire, and therefore within the contemplation of the company's contract. This seems a somewhat forced construction, and in fact gives more than indemnity to the insured.

MUNICIPAL CORPORATIONS—TORTS—MASTER AND SERVANT. The plaintiff, an employee of the defendant city, while engaged in working upon materials to be used in the construction of a street, was injured by the breaking of a stone-crusher owned by the defendant. *Held*, that he could not recover, for the tort was one committed by the defendant in the exercise of its governmental functions, for which it was not liable. *Colwell* v. *Waterbury* (Conn. 1902) 51 Atl. 530. See NOTES, p. 411.

MUNICIPAL CORPORATIONS—TORTS—MASTER AND SERVANT. The plaintiff, a fireman in the employ of the defendant city, was injured by the collapse of a hose-reel. *Held*, that he could not recover, for the tort was one committed by the defendant in the exercise of its governmental functions, for which it was not liable. *Peterson* v. *Wilmington* (N. C. 1902) 40 S. E. 853. See NOTES, p. 411.

PARTNERSHIP—PROPERTY—SHARES IN JOINT-STOCK ASSOCIATION. Interests in land are exempt from transfer taxes by N. Y. Laws 1891, c. 215, § 1. Forty-six of the one hundred shares in the New York Times Association, a joint-stock association, had been devised, and in estimating their value in order to impose the transfer tax, the appraiser had taken into account the value of the Times building. *Held*, this was error, O'BRIEN, J., dissenting. *Matter of Jones* (N. Y. 1902) 69 App. Div. 237. See NOTES, p. 403.

PLEADING AND PRACTICE—ORIGINAL JURISDICTION OF U. S. COURT. The State of Minnesota brought a bill in equity in the U. S. Supreme Court to enjoin the Northern Securities Company, a corporation organized under the laws of the State of New Jersey, from voting, controlling, or obtaining possession of the stock of the Great Northern Ry. Co., a corporation organized under the laws of Minnesota, and of the Northern Pacific Ry. Co., a corporation organized under the laws of Wisconsin. *Held*, the bill would not lie. *Minnesota* v. *Northern Securities Co.* (1902) 184 U. S. 199.

The argument of the court is as follows: As the minority stockholders of the Great Northern Ry. Co. and the Northern Pacific Ry. Co. were not represented by the Northern Securities Co., such companies were necessary parties. A court of equity will not take jurisdiction in the absence of necessary parties when such parties are within the jurisdiction of the court. An amendment to bring them in will not be allowed where their presence would deprive the court of jurisdiction. The presence of such parties as are here necessary would deprive the court of jurisdiction, because the Supreme Court has no original jurisdiction in a suit between a State on the one hand and citizens of another State and of the same State on the other hand. This decision deprives the State of Minnesota of any right to an action against the Northern Securities Co. except in her own courts.

PLEADING AND PRACTICE.—PLEA OF RES JUDICATA UNDER THE N. Y. CODE. Section 1209 of the New York Code of Civil Procedure provides that "A final judgment dismissing the complaint, either before or after a trial, rendered in an action hereafter commenced does not prevent a new action for the same cause of action unless it expressly declares, or it appears by the judgment roll, that it is rendered upon the merits." *Held*, that the fact that the judgment was upon the merits must appear from the judgment roll and cannot be incorporated by reference to other papers in the suit. Three judges out of seven dissented. *Genet* v. *The President, etc., of the Delaware & H. Canal Co.* (1902) 170 N. Y. 278.

The effect of this adjudication is to put the burden upon the plaintiff of showing that the judgment was upon the merits, and such a result seems to accord with the intent of the provision. It applies as well to equitable as to legal actions. *Petrie* v. *Trustees of Hamilton College* (1895) 92 Hun 81. On the general application of such a defence, see Freeman on Judgments, sec. 261, and 1 COLUMBIA LAW REVIEW, 133.

REAL PROPERTY – ADDITIONAL BURDENS TO HIGHWAY. Where an electric road was built upon a highway the fee of which was in the adjoining owner, it was *held*, two judges dissenting, that the electric road imposed an additional burden upon the highway. *Peck* v. *Schenectady Ry. Co.* (1902) 170 N. Y. 298.

PARKER, C. J., delivered a strong dissenting opinion and criticized the leading case of *Craig* v. *Rochester City and Brighton R. R.* (1868) 39 N. Y. 404, which decided that a horse railroad imposed an additional burden upon the land. In thus holding the courts of New York have refused to follow the more liberal view of the majority of jurisdictions in this country where the dedication is held to permit those uses which the convenience of the traveling public and the advance of civilization make necessary. *Pierce* v. *Drew* (1883) 136 Mass. 75. The *Craig* case and the principal case, with *Williams* v. *N. Y. Cen. R. R. Co.* (1857), the case of a steam railroad, illustrate well the conservative attitude of the New York bench.

REAL PROPERTY—BOUNDARIES—ACCRETION. The Crown of England in 1763 granted to the plaintiff's predecessor the fee of a strip of land extending under Long Island Sound 400 feet from the high water mark on City Island. In 1884 the State of New York granted to the defendants, owners of a part of City Island, the premises under water opposite their upland, and the defendants built out a wharf. This grant conflicted with that to the plaintiff's predecessor. In an action of ejectment,

it was *held* that the plaintiff's land extended 400 feet from high-water mark at the time of the suit, and not 400 feet from the high-water mark in 1763. *De Lancey* v. *Wellbrock* (C. C. S. D. of N. Y. 1902) 113 Fed. 103.

Boundaries on water change by accretion. *Rex* v. *Yarborough* (1828) 2 Bligh N. S. 147. And where the grant is of the sea shore both boundaries move by the same principle. *Scratton* v. *Brown* (1825) 4 B. & C. 485. But although the purpose of the grant of 1783 was apparently to secure water privileges, yet, as the thing granted was soil and not an incorporeal right, it is difficult to see why the outer boundary should move. COKE, indeed, speaks of a moveable freehold, Co. Lit. 4 b, 48b.; but the case which he had in mind appears to have depended on a manorial custom. *Welden* v. *Bridgwater* (1592) Cro. Eliz. 421. In *Nixon* v. *Walter* (1886) 41 N. J. Eq. 103, it was held that a grant of upland six rods wide, bounded on high-water mark, had a fixed inner boundary, and could not be pushed back, by the encroachment of the sea, into the land of the adjoining owner.

REAL PROPERTY—COVENANTS RUNNING WITH THE LAND—REASSIGNMENT. See 2 COLUMBIA LAW REVIEW, 341. The citation of the principal case was erroneous. It should be *McEacharn* v. *Colten et al.* [1902] A. C. 104 (P. C.)

REAL PROPERTY—FIXTURES. Tapestries were affixed by means of nails and moulding to walls by a tenant for life, and were removed by the executors. *Held*, they were removable, and did not go to the heir. *Leigh* v. *Taylor* [1902] A. C. — (H. L.) See NOTES, p. 407.

REAL PROPERTY—FIXTURES—NEW LEASE. Tenants of saloon premises put in water-closets and an oak partition. Their assignee subsequently took a new lease from the landlord without reserving any right to these additions. The purchaser on the foreclosure of a chattel mortgage of the lease and fixtures removed the additions. *Held*, that he had a right to do so, as the right to remove trade fixtures, not distinctively realty, is not lost by the taking of a new lease. *Bernheimer* v. *Adams* (N. Y. 1902) 70 App. Div. 114.

If the property never ceased to be chattels, as the court seems to have believed, it need not have been removed during the term, and the taking of a new lease would not affect it. But if it became fixtures, as the court said it did, the case would appear to be governed by *Loughran* v. *Ross* (1871) 45 N. Y. 792. That the fixtures in the latter case was a heavy building is hardly a true ground of distinction, for it is only trade and domestic fixtures which can be removed at all. Like *Smusch* v. *Kohn* (1898) 22 Misc. 344, the principal case illustrates the confusion in the use of the term fixtures, as well as the eagerness of the judges to get away from the technical ruling in *Loughran* v. *Ross*, *supra*, after the discredit thrown upon it in *Lewis* v. *Pier Co.* (1891) 125 N. Y. 341.

SALES—FRAUD. Plaintiff's agent made a contract with the defendant to sell goods for cash and sent the order to the plaintiff who shipped the goods. The defendant falsified the agent's memorandum, making it appear a sale on credit, whereupon the plaintiff, thinking he had mistaken his agent's communication, allowed the credit. *Held*, a fraudulent sale and the plaintiff might rescind. A strong dissenting opinion contended that the transaction was a valid compromise of a dispute, both parties having equal means of knowledge. *Rauh* v. *Waterman* (Ind. 1902) 63 N. E. 42.

As undersood by the majority of the court the case is in accord with what is now the general view that a defendant, who has by his representations induced a plaintiff to deal with him, cannot say that the plaintiff neglected his opportunities for investigation. Bigelow on Fraud, p. 521 *et seq.* and cases cited. Viewed as a compromise, however, which seems a possible construction, the dissenting opinion is undoubtedly correct, and is well supported by the cases cited therein. See *Adams* v. *Sage* (1863) 28 N. Y. 103; *Hennessy* v. *Bacon* (1890) 137 U. S. 78.

SALES—WARRANTY—OPTION OF EXCHANGE. See 2 COLUMBIA LAW REVIEW, 342. The citation of the principal case was erroneous. It should be *Bell* v. *Mills* (1902) 68 App. Div. 531.

STATUTES—WAIVER. Act of March 6, 1899, provided that unskilled labor employed on any public work should be paid not less than fifteen cents per hour. The plaintiff contracted to work at a lower rate, and having been paid the contract price, sued to recover the difference. *Held*, as the act was passed for the benefit of the laborer and as a waiver of it would not violate public policy, the plaintiff's contract would be considered such a waiver and would bar his recovery. *Bell* v. *Town of Sullivan* (Ind. 1902) 63 N. E. 209.

Whether one may waive the benefit of a statute is a question of public policy and depends on the terms of the particular statute. *White* v. *Insurance Co.* (1877) 4 Dill. 177. The views of the courts as to labor legislation are not in this respect uniform. Thus it has been held that an agreement to work overtime without extra pay is not in contravention of a statute declaring eight hours a day's work. *U. S.* v. *Martin* (1876) 94 U. S. 400. *McCarthy* v. *Mayor* (1884) 96 N. Y. 1. On the other hand a statute requiring corporations to pay wages weekly was declared unconstitutional on the ground among others, that it unduly restricted the right of employees to contract. *Braceville Coal Co.* v. *People* (1893) 147 Ill. 66. And in another case it was intimated that a provision of the Kentucky constitution requiring the wages of certain classes of employees to be paid in lawful money would render a contract for payment in a different medium void, though it was not prohibited in terms. *Avent Beattyville Coal Co.* v. *Commonwealth* (1894) 96 Ky. 218. The court in the principal case followed the former line of decisions, although they would seem seriously to impair the practical effectiveness of such statutes.

TAXATION—SHARES OF STOCK. Under a statute providing (1) that all domestic and foreign corporations shall return for taxation their property which may be within the State (2) but that no person shall be required to return any shares in any corporation whose capital stock is taxed in the name of the company, *held* (DAVIS, J., dissenting) the plaintiff's stock in a domestic corporation which failed to comply with the statute because all its property was located in Canada, is liable to assessment, and not within the second clause of the statute. *Lander* v. *Burke* (Ohio, 1902) 63 N. E. 69.

The court's view is that only the performance of the corporation's duty to list its property relieves the shareholder from listing his shares, and that where the corporation has no property in the state, and hence does not return any property for taxation, it follows that the shareholder is not relieved from taxation on his shares. As DAVIS, J., points out, this may result in double taxation, for the corporation's property undoubtedly will be taxed in the jurisdiction where it is. Yet the decision is the logical outcome of *Bradley* v. *Bander* (1880) 36 Ohio St. 28, which held taxable shares in a foreign corporation, none of whose property was in the State, and *Sturges* v. *Carter* (1884) 114 U. S. 511, which construed the same law as to a foreign corporation only a small part of whose property was in the State. A different result was reached in *Whitaker* v. *Brooks* (1890) 90 Ky. 68, and in *Ridpath* v. *Spokane Co.* (1900) 23 Wash. 436.

TORTS—MALICIOUS INJURY—TRADE-UNION - STRIKES. The plaintiffs, members of a trade-union, and the defendants, who belonged to a rival organization of a similar character, had been employed by a common master. Desiring to procure the discharge of the plaintiffs, and the employment of their own fellow-members in their stead, the defendants notified the employer of their wishes, stating that they would go out on strike in case he did not act as they desired. The plaintiffs, having, in consequence, been dismissed, brought suit to recover damages for loss of employment.

Held, they had no right of action. *National Protective Association et al.* v. *Cumming et al.* (1902) 170 N. Y. 315. See NOTES, p. 400.

WILLS—CONSTRUCTION OF STATUTE—MILITARY SERVICE. Where the question was as to the validity of a nuncupative will, it was *held* that mobilization is a fair test of whether a soldier is "in actual military service" within the exception contained in the English Wills Act of 1837, § 11; mere warning for mobilization is not sufficient. *Gattward* v. *Knee* [1902] P. 99.

The New York Statute of Wills is similarly worded. 2 R. S. 60, § 22. The phrase in question has been construed here, by way of dictum, to mean that "there must be actual warfare, and the soldier be engaged *in expeditione*." *Ex parte Thompson* (1856) 4 Bradf. 154.

WILLS—REVIVAL BY CODICIL. By a later will the testator revoked a will of an earlier date, and then intentionally destroyed the first will. Thereafter he desired to execute a codicil to the later will, but the scrivener under mistake prepared it in form as a codicil to the earlier will, and the testator executed it thinking it a codicil to the second will. *Held*, the second will and the codicil were entitled to probate, omitting from the latter its reference to the earlier will. *In the goods of Reade* [1902] P. 75.

By basing his judgment on *Rogers* v. *Goodenough* (1861) 2 Sw. & Tr. 342, GORELL BARNES, J., avoids the question as to admitting parol evidence of the testator's intention when he signed the codicil. If the first will were still in existence, clearly it would be revived, for the testator's mind accompanied the act of execution. *In the goods of Stedham* (1881) 6 P. D. 205; *In the goods of Chilcott* [1897] P. 223. LORD PENZANCE reached a conclusion contrary to these two cases, with practically no reasons assigned, in *In the goods of Anderson* (1870) 39 L. J., P. & M. 55; in *In the goods of Gordon* [1892] P. 228, as reported in 67 L. T. 328, where the same thing was held, it appeared that all parties consented to the decree. But in *Rogers* v. *Goodenough*, *supra*, where the testator really meant to revive the destroyed will, it was held, as matter of law, that intention to revoke the second will was contingent on success in reviving the first, and, as this could not be done, the second will and so much of the codicil as was consistent therewith could be probated. The exact contrary has been held in Ireland, and such an abortive attempt works intestacy. *Newton* v. *Newton* (1862) 12 Irish Ch. 118, reversing S. C. 5 L. T. 218.